No. 89-655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARL R. DAVIES,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY and BROTHERHOOD OF RAILWAYS, AIRLINE, AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS and STATION EMPLOYEES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DAVID M. BROWN
(Counsel of Record)
ROSEMARY SMITH
SMITH, GAMBRELL & RUSSELL
2400 First Atlanta Tower
Atlanta, Georgia 30383
(404) 656-1800
Attorneys for Southern Pacific Transportation Company

JAMES M. DARBY
(Counsel of Record)
Associate General Counsel
Transportation Communications International Union
3 Research Place
Rockville, Maryland 20850
(301) 948-4910
Attorney for Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees

Lex Publishing Company, 2161 Monroe Dr., Atlanta, Georgia 30324 (404) 875-5140

TABLE OF CONTENTS

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

WHOLLY OWNED SUBSIDIARIES OF RESPONDENT SOUTHERN PACIFIC TRANSPORTATION COMPANY

Evergreen Leasing Corporation
Los Angeles Union Terminal, Inc.
Northwestern Pacific Railroad Company
Pacific Fruit Express Company
Pacific Motor Transport Company
St. Louis Southwestern Ry. Co.
Dallas Terminal Ry. and Union Depot Co.
The Southwestern Town Lot Corp.
Southern Pacific Air Freight, Inc.
Southern Pacific Equipment Company
Southern Pacific International, Inc.
Southern Pacific Marine Transport, Inc.
Southern Pacific Motor Trucking Company
Southern Pacific Telecommunications Company
Southern Pacific Warehouse Company
Visalia Electric Railroad Company

NON-WHOLLY OWNED SUBSIDIARIES OF RESPONDENT SOUTHERN PACIFIC TRANSPORTATION COMPANY

Central California Traction Company
The Ogden Union Ry. & Depot Co.
Portland Terminal R.R. Co.
Portland Traction Company
Sunset Railway Company
Trailer Train Company
The Alton & Southern Ry. Co.
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Co.
Southern Ill. and Mo. Bridge Co.
Terminal R.R. Assoc. of St. Louis
Trailer Train Company

PARENT COMPANY OF RESPONDENT SOUTHERN PACIFIC TRANSPORTATION COMPANY

SPTC Holding, Inc.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(cont.)

TABLE OF AUTHORITIES
(cont.)

Cases **Page**

Statutes

TABLE OF AUTHORITIES
(cont.)

No. 89-655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARL R. DAVIES,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY and BROTHERHOOD OF RAILWAYS, AIRLINE, AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS and STATION EMPLOYEES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Southern Pacific Transportation Company and Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees respectfully request this Court to deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below.*

On August 19, 1987, Petitioner Carl R. Davies ("Mr. Davies") filed a civil action in the United States District Court for the Northern District of Georgia against Respondents Southern Pacific Transportation Company ("Southern Pacific") and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC"). Mr. Davies alleged a breach of contract by Southern Pacific and a breach of the duty of fair representation by BRAC. In February 1988, Southern Pacific and BRAC filed motions for summary judgment. On July 7, 1988, the district court granted Respondents' motions for summary judgment and dismissed all of Mr. Davies' claims. The court held that Mr. Davies' action was time-barred because it was not filed within the applicable six-month limitations period. As an independent basis for its judgment, the court held that Mr. Davies' action was substantively barred by the exclusive administrative remedy provisions of the Railway Labor Act.

Petitioner filed a Notice of Appeal from the district court's judgment on August 10, 1988. The Eleventh Circuit Court of Appeals affirmed the district court's judgment without opinion. The court of appeals determined that the granting of summary judgment was supported by the record and that an opinion would have no precedential value pursuant to Eleventh Circuit Court Rule 36.1. Subsequently, on October 15, 1989, Mr. Davies filed in the Supreme Court of the United States a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

B. *Statement Of The Facts.*

The facts in this matter are largely undisputed. Effective March 1, 1953, Respondents Southern Pacific and BRAC en-

tered into a Union Shop Agreement covering certain designated positions of employment, including positions in off-line offices.[1] Under the Agreement, failure of an employee to maintain his membership in BRAC by paying union dues is a violation subjecting the employee to dismissal. Petitioner was hired by Respondent, Southern Pacific, on March 1, 1983, as a chief clerk in Southern Pacific's off-line traffic office in Atlanta, Georgia, which was a position covered under rule "1(C)" of the Collective Bargaining Agreement and specifically covered under the Union Shop Agreement. At some subsequent date, BRAC became aware that Mr. Davies was employed in a union shop position but had not joined BRAC or paid his union dues. By letter dated April 16, 1986, BRAC notified Petitioner that the terms of the Union Shop Agreement required him to join the union, and that he owed $1,312.80 in back dues and initiation fees. Mr. Davies then responded by tendering the initiation fee and current dues to BRAC, along with a membership application, but refused to pay back dues as requested by BRAC. BRAC advised Mr. Davies by letter dated May 6, 1987, that it refused to accept his partial payment, but offered to arrange a payment plan if Mr. Davies was unable to pay the entire amount of his back dues at that time.

On June 27, 1986, Southern Pacific received notice from BRAC that Mr. Davies had failed to comply with the terms of the Union Shop Agreement by failing to pay his dues to maintain his membership in BRAC. In accordance with Section 5(a) of the Union Shop Agreement, within ten calendar days Southern Pacific notified Mr. Davies that BRAC had advised the company that Mr. Davies had failed to comply with the Union Shop Agreement by failing to maintain membership in BRAC.

---

[1] An "off-line" office is simply an office not located at a Southern Pacific facility on a rail line operated by Southern Pacific.

Within ten days, Mr. Davies requested Southern Pacific to afford him a hearing, so that he could dispute the alleged failure to comply with the Union Shop Agreement.

The requested hearing was held on July 31, 1986, before Southern Pacific's Assistant Vice-President-Sales, J. J. Sternagle. Mr. Davies was represented by his current counsel, Ms. Jan McKinney. On August 20, 1986, Southern Pacific notified Petitioner that, on the basis of the evidence produced at the hearing, Mr. Sternagle of Southern Pacific had decided Petitioner had failed to comply with the Union Shop Agreement.

Petitioner appealed Mr. Sternagle's decision to Mr. H. A. Shiver, Manager of Labor Relations for Southern Pacific, and its highest officer designated to handle appeals under the Union Shop Agreement, Section 5(b). Mr. Shiver reviewed all the evidence and informed Mr. Davies that Southern Pacific's decision on appeal was that he had failed to comply with the terms of the Union Shop Agreement.

Within the time provided by Section 5(c) of the Union Shop Agreement, Petitioner's attorney, Ms. McKinney, requested that a neutral mediator be appointed to decide the dispute. The National Mediation Board appointed Dr. Frances X. Quinn, who conducted an arbitration hearing December 9, 1986. At that time he heard evidence from Mr. Davies, BRAC and Southern Pacific, and also received statements and exhibits. Petitioner was once again represented by attorney McKinney. Petitioner's defense during arbitration was limited to the argument that because neither Southern Pacific nor BRAC had fully complied with the notification provisions of the Union Shop Agreement, resulting in a delayed notification to Petitioner of his obligation to pay dues to the union, Petitioner should not be required to comply with the Union Shop Agreement by paying back dues.

On January 6, 1987, Dr. Quinn issued a written opinion and award setting forth findings and conclusions supporting his denial of Mr. Davies' grievance.[2] Dr. Quinn found that Petitioner had been treated identically to other employees as provided by the Union Shop Agreement, and had enjoyed the benefits of representation. Dr. Quinn further found Petitioner in clear violation of the Union Shop Agreement for failure to pay dues, despite the fact that BRAC had offered to accommodate him with a payment plan, and that Mr. Davies had been forewarned of the consequences of failure to pay the dues. Dr. Quinn found that Petitioner's failure to pay was mitigated somewhat by "faulty communication" between Southern Pacific and BRAC. Therefore, Dr. Quinn gave Petitioner one last chance to bring himself into full compliance by paying all dues and back payments owed in two installments, the first to be paid within thirty days of the decision. Under the award, failure to pay would subject Petitioner to termination.

Petitioner acknowledged receipt of the arbitration award by letter to Mr. Trittel of BRAC on January 22, 1987. Petitioner further received letters from BRAC on January 24, 1987, and February 7, 1987, demanding that Mr. Davies comply with the arbitrator's award or face discharge. Mr. Davies chose not to comply with the arbitrator's award, and instead submitted his letter of resignation dated February 23, 1987, notifying Southern Pacific that he had resigned from employment effective February 16, 1987, the date his first payment of back dues had been due under the award. At no time prior to the issuance of the arbitrator's award on or about January 6, 1987, or thereaf-

---

[2] The cover letter sent with the award, addressed to Petitioner, as well as his counsel, Ms. McKinney, and BRAC and Southern Pacific representatives, is dated January 6, "1986" [sic]. The award itself was mistakenly dated "January 15, 1986."

ter did Petitioner object to the timeliness of the award, and in fact the award was mailed less than thirty days after the date the arbitration hearing was held.

On August 19, 1987, more than six months after the arbitrator's award was issued, and also more than six months after the effective date of Petitioner's resignation from Southern Pacific's employment, Petitioner filed his Complaint. The Complaint was framed simply as a claim against Respondent Southern Pacific for wrongful discharge of Mr. Davies pursuant to the Union Shop Agreement and against Respondent BRAC for breach of duty of fair representation for failing to timely notify Mr. Davies of his obligation to pay dues, and refusing to accept his tender of partial dues. Petitioner's Complaint made no mention of the fact that arbitration had already been conducted concerning these very issues, and that arbitration had resulted in an award against him. In addition, Petitioner did not ask the court to review the arbitrator's award pursuant to 45 U.S.C. § 153 First (q), nor did he allege any improper action by the arbitrator in violation of that or any other section of the Railway Labor Act. Petitioner did not allege that any wrongful conduct on the part of BRAC or Southern Pacific had "tainted" the arbitration process in any way. Petitioner simply framed his complaint so as to have the district court relitigate the very issues which had already been litigated by the arbitrator unfavorably to Petitioner's position. After both Respondents filed motions for summary judgment, Petitioner, in his responses to those motions, admitted that there had been a previous arbitration resulting in an award against him, and urged the district court to review the merits of that award.

SUMMARY OF ARGUMENT

This case is not a proper one for the Court's exercise of discretion in granting a Writ of Certiorari. The law applicable to the facts of this case is clear and straight forward and was properly applied by the courts below. This case is not one which presents a special or important reason for this Court's review.

Petitioner's claim is time barred by the six month statute of limitations established in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983) which applies in hybrid fair representation/breach of contract actions. There is no conflict among the various circuit courts as to the application of the six month statute of limitations to such a claim, nor is there conflict as to when the statute of limitations accrues and/or is tolled. The "discovery doctrine" is the standard rule of accrual applicable to federal statute of limitations. Discovery, in the context of hybrid cases such as the one before this Court, is when the plaintiff learns of the union and employer's actions which trigger the plaintiff's complaint, or learns of the union's inaction in response to an alleged breach of contract by the employer.

In certain instances, the statute of limitations will be tolled to further the policy in favor of non-judicial resolution of labor disputes. Such tolling may occur while the employer and the union, on the plaintiff's behalf, exhaust the contractual grievance/arbitration procedures. In this case, the statute of limitations did not begin to run until the arbitrator made his decision which exhausted the contractual grievance/arbitration procedure. Petitioner's complaint was not filed within six months of the arbitrator's award nor was it filed within six months of the date that the first payment ordered by the arbitrator was due. Petitioner erroneously asks this Court to review the district court's findings of fact and proper application of the six month statute of limitations barring his claim, as well as, the

court of appeals' affirmation of the holding. This issue is not an appropriate one for the granting of a Writ of Certiorari by this Court.

Petitioner's request of this Court is, additionally, improper because federal courts have no jurisdiction under the Railway Labor Act to hear issues de novo which have been litigated in arbitration. One of the major purposes of the Railway Labor Act is to provide prompt and orderly settlement of all minor disputes. Minor disputes are those which grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. The Railway Labor Act provides a comprehensive system for settlement of such minor disputes by the use of compulsory arbitration. As an alternative reason for dismissal, the district court properly determined that Petitioner's claim was barred because the only forum for his claim was arbitration which he had already pursued. The court of appeals properly affirmed the district court's decision to dismiss Petitioner's claim on both grounds. Petitioner's claim was time barred by the six month statute of limitations and was foreclosed by the district court's lack of jurisdiction over such a claim.

ARGUMENT

I. THIS COURT SHOULD NOT REVIEW THE LOWER COURTS' APPLICATION OF THE *DELCOSTELLO* LIMITATIONS PERIOD TO A HYBRID FAIR REPRESENTATION/BREACH OF CONTRACT CASE, INCLUDING THE DETERMINATION OF WHEN THE LIMITATIONS PERIOD ACCRUED AND/OR WAS TOLLED, SINCE THERE IS NO CONFLICT IN THE CIRCUITS AS TO THESE PRINCIPLES AND PETITIONER SIMPLY DISAGREES WITH THE FACTUAL FINDINGS OF THE DISTRICT COURT AND THE MANNER IN WHICH IT CORRECTLY

APPLIED THESE WELL ESTABLISHED LIMITATION PRINCIPLES TO THE FACTS OF THIS CASE.

A. There Is No Conflict In The Circuits As To When The Six Month *DelCostello* Limitation Period Accrues And/Or Is Tolled In Hybrid Fair Representation/Breach Of Contract Cases.

Petitioner appears to assert that the circuits are unsettled on the question as to when the six month limitation period set forth in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983), begins to run or is tolled in hybrid fair representation/breach of contract actions. In fact, the principles of accrual and tolling as they apply to the *DelCostello* limitations period are well settled. The "disparate holdings" and "multiplicity of decisions in the circuits" cited by Petitioner (Ptn. pp. 12, 21-28) are merely the result of the courts' application of these uniform standards to a myriad of factual circumstances.

The "discovery doctrine" is the standard rule of accrual applicable to federal statutes of limitations. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *see also Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1872); *NLRB v. Don Burgess Const. Co.*, 596 F.2d 378, 382-83 (9th Cir. 1979), *cert. denied*, 444 U.S. 940. The discovery doctrine identifies the point at which the federal limitations period begins to run as when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts onstituting the alleged violation. The federal courts uniformly apply this same principle when determining when the *DelCostello* six month limitation period begins to run in hybrid fair representation/breach of contract cases.[3]

---

[3] *Alcorn v. Burlington N. R.R. Co.*, 878 F.2d 1105, 1108 (8th Cir. 1989) ("when a claimant knows or should know through an exercise of reasonable diligence of the acts constituting the alleged violation"); *Bartels v. Sports Arena Employees Local 137*, 838 F.2d 101, 105 (3d Cir. 1988) (court rejects plaintiff's conten-

Although this general rule has been consistently applied to "hybrid" cases, the precise point in time at which the six month period begins to run depends entirely on the particular facts of each case. Generally, the point at which plaintiff "becomes aware or should have been aware of" the acts constituting the alleged breach by a union and an employer is when he or she learns of the union and employer's actions which trigger the member's complaint, or learns of the union's inaction in response to an alleged breach of contract by the employer. *See Clift v. U.A.W.*, 818 F.2d 623, 630 (7th Cir. 1987) (cause of action accrued when plaintiffs learned of the contents of a negotiated agreement affecting their recall rights); *Alcorn*, 878

---

tion that "the union's allegedly ongoing wrongdoing" excused plaintiff's delay in filing actions); *Arriaga-Zayas v. Int'l Ladies' Garment Workers Union*, 835 F.2d 11, 13 (1st Cir. 1987) (cause of action accrues "when the plaintiff knows, or reasonably should know, of the acts constituting the union's alleged wrongdoing," quoting *Graham v. Bay State Gas Co.*, 779 F.2d 93, 94 (1st Cir. 1985); *Eatz v. DME Unit of Local Union Number 3*, 794 F.2d 29, 33 (2d Cir. 1986) (action accrues "when the union members know or reasonably should know that a breach of that duty has occurred"); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986) ("when an employee knows or should know of the alleged breach of duty"); *Dowty v. Pioneer Rural Elec. Co-Op, Inc.*, 770 F.2d 52, 56 (6th Cir. 1985), *cert. denied*, 474 U.S. 1021 (action accrues "when the claimant knows or should have known of the union's alleged breach"); *Farr v. H. K. Porter Co., Inc.*, 727 F.2d 502, 505 (5th Cir. 1984) ("we look to when the plaintiffs either were or should have been aware of the injury itself, not to when the plaintiffs became aware of one of the injury's many manifestations"); *Benson v. Gen. Motors Corp.*, 716 F.2d 862, 864 (11th Cir. 1983) ("when plaintiffs either were or should have been aware of the injury itself, not . . . when plaintiffs became aware of one of the injury's many manifestations"); *Metz v. Tootsie Roll Indus.*, 715 F.2d 299, 304 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984) (period begins to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation"); *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975) ("[f]ederal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action").

F.2d at 1108 (cause of action accrued when plaintiffs learned that union would not pursue their complaint against the employer through the grievance arbitration procedure); *Archer v. Airline Pilots Ass'n*, 609 F.2d 934, 937-38 (9th Cir. 1979), *cert. denied*, 446 U.S. 953 (cause of action accrued when union closed its file on plaintiff's case and refused to pursue a grievance against the employer); *Benson*, 716 F.2d at 863-64 (cause of action accrued when seniority rosters were posted notifying plaintiffs of the union and employer's modification of their seniority rights).

Notwithstanding the consistent application of these accrual principles, the federal courts have recognized that technical time bars may be overcome by equitable considerations. Thus, the federal courts applying the *DelCostello* limitation period to hybrid fair representation/breach of contract actions have invariably held that in order to further the policy in favor of non-judicial resolution of labor disputes, in certain instances, the running of the statute of limitations period in a hybrid case will be tolled while the employer and the union, on the plaintiff's behalf, exhaust the contractual grievance arbitration procedures. The First, Second, Third, Fourth, Sixth, Eighth, Ninth and Eleventh Circuits have all recognized that a plaintiff's hybrid cause of action will not accrue until the contractual grievance/arbitration machinery is fully exhausted. Exhaustion of this procedure is generally deemed to be when the plaintiff receives notice of an adverse arbitration award. *See Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 164-166 (2d Cir. 1989); *Beardsley v. Chicago N.W. Transp. Co.*, 850 F.2d 1255, 1265 (8th Cir. 1988); *Childs v. Penn. Fed'n Bhd. of Maintenance Way Employees*, 831 F.2d 429, 434-435 (3d Cir. 1987); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146, 1147-1148 (4th Cir. 1983), *cert. denied*, 469 U.S. 916 (1984); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1508-1510 (9th Cir. 1986). Accrual may occur at some earlier point if the

union refuses to exhaust fully the grievance/arbitration procedures on behalf of the plaintiff.[4]

Since the principle of tolling is an equitable doctrine, in some cases the courts will not accept a plaintiff's tolling argument where the court deems that the equities present weigh against extending the limitations period. Thus, in *Arriaga-Zayas v. I.L.G.W.U.*, 835 F.2d 11, 14-15 (1st Cir. 1987), one reason the court refused to toll the six month statute of limitations during the period the plaintiff's grievance was arbitrated was because, like the instant case, the plaintiff had retained an attorney to represent his interests prior to the arbitration proceeding. Additionally, it was unclear that the arbitration proceeding had any bearing on the claims filed in the plaintiff's hybrid lawsuit; thus, the policy in favor of non-judicial resolution was not served by tolling the six month statute of limitations. *See, Ghartey*, 869 F.2d at 165 and *Childs*, 831 F.2d at 435 (where the courts recognized that the *DelCostello* limitations period will begin to run, notwithstanding the existence of a grievance arbitration procedure, where the union and plaintiff take on

---

[4] See *Demars v. Gen. Dynamics Corp.*, 779 F.2d 95, 97 (1st Cir. 1988) (hybrid cause of action accrues when union withdrew grievance filed against employer on plaintiff's behalf); *Stafford v. Ford Motor Co.*, 835 F.2d 1227, 1233 (8th Cir. 1987) (hybrid cause of action tolled while union pursued the grievance procedure against employer but began to run when union withdrew grievance after the third step); *Zuniga v. United Can Co.*, 812 F.2d 443, 449 (9th Cir. 1987) (cause of action accrued when the union advised the plaintiff that it would not pursue his grievance against employer any further); *Proudfoot v. Seafarer's Int'l Union*, 779 F.2d 1558, 1559 (11th Cir. 1986), *vacating in part*, 767 F.2d 1538 (11th Cir. 1985) (cause of action accrued when union exhausted its negotiations with the employer in an effort to get a discharged plaintiff reinstated); *Shapiro v. Cook United, Inc.*, 762 F.2d 49, 51 (6th Cir. 1985) (hybrid cause of action accrued when union chose not to submit grievance against employer to arbitration).

an "adversarial posture" prior to the exhaustion of the contractual remedies).

The foregoing case law demonstrates that, although the *results* of each case were different depending on the particular facts and equities present in each case, the lower courts have consistently applied uniform standards for determining when a hybrid fair representation/breach of contract cause of action accrues and/or is tolled. It is respectfully submitted that well-settled "guidelines" already exist which provide the lower courts with the direction and flexibility to make the requisite factual determinations and evaluate the particular equities in each individual case in order to determine if a cause of action is timely.[5]

---

[5] Contrary to Petitioner's contention (Ptn. pp. 18-19) this Court's vacating the Eleventh Circuit decision of *Hester v. Int'l Union of Operating Eng'r*, 818 F.2d 1537 (11th Cir. 1987), *reh'g denied*, 830 F.2d 172 (11th Cir. 1987), *vacated* 109 S. Ct. 831 (1989), is irrelevant to the instant petition. *Hester* involved, *inter alia*, the issue of the appropriate statute of limitations to be applied to suits brought under Title I of the Labor Management Reporting and Disclosure Act ("LMRDA") and whether such limitations period is tolled where a plaintiff attempts to exhaust *internal union remedies*, not contractual grievance/arbitration procedures. *Cf. Clayton v. Int'l Union United Auto., Aerospace, Agric. Impliment Workers*, 451 U.S. 679 (1981); *Fransden v. Bhd. of Ry., Airline & Steamship Clerks*, 782 F.2d 674 (7th Cir. 1986). This Court vacated the judgment in *Hester* based on its interim ruling in *Reed v. United Transp. Union*, 108 S. Ct. 1105 (1989) that actions under Title I of the LMRDA are not controlled by a six month limitations period, as the Eleventh Circuit found in *Hester*, but by the most analogous state personal injury statute of limitations. The *Reed* decision did not in any way deal with the issues of accrual or tolling, and the Petitioner makes no contention that anything other than a six month statute of limitations is applicable to the instant matter. The district court below cited the *Hester* case solely as supporting authority for the proposition that the *DelCostello* six month statute of limitation accrues when the grievance procedure is "exhausted or otherwise broke down to the employee's disadvantage" (Ptn. p. 37(a)), a principle that was left undisturbed by this Court's ruling in *Reed*.

B. Petitioner Does Not Present An Appropriate Issue For This Court To Review Since it Simply Involves A Disagreement Over Factual Findings And The Manner In Which The Lower Courts Properly Applied Well-Settled Principles Of Law To These Findings.

i. *Petitioner asks this court to review evidence and facts which were resolved below in favor of Respondents.*

Petitioner asks this Court to review this case because he disagrees with the lower courts' factual findings and the manner in which the lower courts applied the well-settled accrual and/or tolling principles to these findings. Petitioner asserts that different accrual and tolling standards should have been applied to Petitioner's version of the facts herein — facts which Petitioner contends are inapposite to the facts present in other *DelCostello* limitation cases.

This Court has consistently refused to grant certiorari to review evidence and discuss specific facts. *Texas v. Mead*, 465 U.S. 1041 (1984); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177, n.8 (1981); *United States v. Johnston*, 268 U.S. 220, 227 (1925). The Petitioner seeks to have this Court review facts which in Petitioner's view would alter the outcome of this case. The asserted facts were rejected by the lower courts and have no support in the record. *See* (Ptn. pp. 9, 20); *but see* (Ptn. pp. 34(a), 38(a) n.2).

ii. *The lower courts properly applied the well-settled accrual and tolling principles to the facts of this case.*

Even if this Court were to deem this matter worthy of review, the district court properly concluded that Petitioner's claim against Respondents was time barred by the *DelCostello* six month limitations period. BRAC clearly communicated to

Petitioner as early as April 1986 its position that the provisions of the Union Shop Agreement were applicable to him and that he was required to pay the back dues that he owed. Thereafter, Petitioner retained counsel and sought to have BRAC's interpretation of the Union Shop Agreement set aside in arbitration. In January 1987, Petitioner and his counsel received copies of the arbitrator's decision, which concluded that Petitioner was in violation of the Union Shop Agreement. Petitioner, rather than complying with the award, resigned from employment effective February 16, 1987. (Ptn. pp. 37(a) - 38(a)).

Based on these facts the district court properly concluded that Petitioner knew or should have known of the cause of action against BRAC and Southern Pacific when the grievance procedure was exhausted; namely on January 24, 1987 when Petitioner and counsel received notice of the arbitrator's adverse decision. (Ptn. p. 38(a)). This decision comports with the authority previously discussed wherein the courts permit the contractual grievance arbitration procedure to toll the running of the limitations period until — *at the latest* — notice of the award is received. Moreover, although not specifically relied on by the courts below, the equities in favor of tolling the statute of limitations beyond the date Petitioner learned of the arbitration award simply are not present in this case, in light of the fact that Mr. Davies was represented by counsel during the entire time period the statute of limitations accrued and was tolled.

The decisions of the courts below were correct and in accordance with well-settled law applied to the facts of this case. Petitioner raises no cognizable grounds upon which to review the lower courts' decisions.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S FINDING THAT PETITIONER MAY NOT RELITIGATE ISSUES IN FEDERAL COURT WHICH HAVE PREVIOUSLY BEEN DECIDED IN ARBITRATION.

As an alternative ground for granting summary judgment, the district court determined that Petitioner's claim was barred by arbitration. As the district court pointed out in its order, "the exclusive remedy for the type of claim [Petitioner] makes is the administrative procedure [Petitioner] has already pursued." (Ptn. p. 39(a)).

A. Federal Courts Have No Jurisdiction To Hear Issues De Novo Which Have Been Litigated At Arbitration Pursuant To Procedures Established Under The Railway Labor Act.

"A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding." *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972), citing *Union Pac. R.R. Co. v. Price*, 360 U.S. 601 (1959). One of the five principal purposes of the Railway Labor Act ("RLA") is "to provide for the prompt and orderly settlement of all disputes growing out of the grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 U.S.C. § 151a(5). These disputes are known as "minor" disputes. *DeTomaso v. Pan Am. World Airways, Inc.*, 43 Cal.3d 517, 733 P.2d 614, 618 (1987), *cert. denied*, 108 S. Ct. 100 (1987). Chapter 8 of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, provides "an exclusive and comprehensive system for settlement of minor disputes through a process in the nature of compulsory arbitration using those with expertise in day to day operation of the railroad industry." *Barrett v. Mfrs. Ry. Co.*, 326 F. Supp. 639, 645 (E.D. Mo. 1971), *aff'd*, 453 F.2d 1305 (8th Cir. 1972). Under the RLA,

all disputes between a carrier and its employees are to be considered and decided by conference between designated representatives of the carrier and employees respectively. 45 U.S.C. § 152 Second. Minor disputes are to be adjusted and are to be settled "on the property" "in the usual manner," and failing adjustment, either party can take the matter to the National Adjustment Board or to a system, group or regional board of adjustment created to decide disputes of that character. 45 U.S.C. § 153 First (i); 45 U.S.C. § 153 Second; *Int'l Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682 (1963). "Congress considered it essential to keep so-called minor disputes within the boards of adjustment and out of the courts because finality of administrative determinations is essential to the boards in fulfilling their task of promoting stability in the air and rail carrier industries." *DeTomaso v. Pan Am. World Airways, Inc.*, 733 P.2d at 619.

Petitioner has characterized his claim against Southern Pacific as one for "wrongful discharge" by means of an allegedly improper application or interpretation of the Union Shop Agreement between Southern Pacific and BRAC. The extent of Southern Pacific's duty to maintain Petitioner as an employee in this case depended on interpretation or application of the Union Shop Agreement, which is clearly a minor dispute subject to the RLA's requirement that it be submitted to grievance and arbitration. *See, e.g., Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972) (merits of petitioner's wrongful discharge claim depended on an interpretation of the collective bargaining agreement and was a minor dispute required by the RLA to be submitted to the Board of Adjustment).

Petitioner also asserts that he allegedly did not receive certain benefits to which he was entitled under the collective bargaining agreement; a claim also categorized as a minor dispute.

Because the RLA mandates that a minor dispute be resolved by resort to arbitration and grievance procedures, those procedures are the exclusive remedy available to the claimant. *Andrews*, 406 U.S. at 322; *DeTomaso*, 733 P.2d at 619; *see also Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 429 (9th Cir. 1983) (where plaintiff's complaints referred to work conditions, disciplinary procedures, or rights covered by or substantially related to the collective bargaining agreement, the controversy was a minor dispute within the exclusive province of the grievance mechanisms of the Railway Labor Act). Recognizing his claim as a minor dispute, Petitioner submitted to the grievance and arbitration procedures required by the RLA. In this case, the arbitrator's decision resolved the dispute with finality and the district court, as it recognized and properly noted in its order, had no subject matter jurisdiction to resolve this minor dispute.

B. Federal Courts Have Jurisdiction To Review Arbitration Awards Under A Very Narrow Standard, And Such Review Has Never Been Requested By Petitioner.

The scope of judicial review of arbitration awards under the RLA is "among the narrowest known to the law." *Atchison, Topeka & Santa Fe Ry. v. Buell*, 107 S. Ct. 1410, 1414 (1987). Where a party has litigated a minor dispute before the Adjustment Board, he is limited to the judicial review of the Board's proceeding that the RLA itself provides. *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972). The scope of review of an arbitrator's decision is established under the Railway Labor Act at 45 U.S.C. § 153 First (q) which provides:

> (q) . . . On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for

> failure of the division to comply with the requirements of this Chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order....

The three grounds of (1) failure of the arbitrator to comply with the requirements of the RLA, (2) failure of the award to conform, or confine itself to matters within the scope of the arbitrator's jurisdiction, or (3) fraud or corruption by an arbitrator have been determined, by this Court, to be the sole bases for setting aside an arbitration award. *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89 (1978). The Railway Labor Act's "statutory language means just what it says." *Id.* at 93.

The arbitrator in this case heard and decided various issues, including the compliance by Petitioner with the Union Shop Agreement, the compliance by Southern Pacific and BRAC with the notification provisions of the Union Shop Agreement, and the enjoyment by Petitioner of the benefits of union membership equal to other employees in the union. The arbitrator heard and decided these issues against Petitioner. The arbitrator denied Petitioner's grievance and granted him the opportunity to remit in two payments the monies owed to put himself into full compliance with the Union Shop Agreement. The arbitrator also stated that failure to comply with such provisions of the award would result in termination of Mr. Davies' employment relationship. In this case, Petitioner has never asserted that the arbitration proceeding was tainted by any one of the three grounds which would allow the district court to review the arbitration award. To allow Petitioner to proceed would circumvent the statutory restrictions on judicial review of arbitration decisions. *Andrews*, 406 U.S. at 324; *Pitts v. Nat'l R.R. Passenger Corp.*, 603 F. Supp. 1509, 1515 (E.D. Ill. 1985). As this Court recently stressed in *United Paper Workers Int'l Union, AFL-*

CIO v. Misco, 108 S. Ct. 364 (1987), "[t]he courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." The district court properly determined that Petitioner could not relitigate his claim in an independent federal judicial proceeding.

C. Standards Of Review Established Under The Labor Management Relations Act For Arbitration Awards Are Irrelevant To This Petition.

Petitioner continues to rely on case law construing Section 301 of the Labor Management Relations Act ("LMRA"). The LMRA, by its own terms, does not apply to Railroad employers, employees or unions. 29 U.S.C. § 152(2) of the LMRA defines employer as "any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any person subject to the Railway Labor Act, as amended from time to time, or any labor organization. . . ." The Code defines the term employee as including "any employee . . . but shall not include any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. § 152(3). Southern Pacific is clearly a railroad, BRAC is a railroad union, and Mr. Davies was an employee of Southern Pacific; therefore, none of these three parties are governed by the LMRA. Additionally, federal courts do not have jurisdiction under Section 301 of the LMRA, 29 U.S.C. § 185, over suits brought by parties that are covered by the RLA. *Raus v. Bhd. Ry. Carmen of United States and Canada*, 663 F.2d 791 (8th Cir. 1981).

Petitioner erroneously cites *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) for the proposition that disputes arising out of labor contracts should not be limited only to the arbitral process. This Court in *Lueck* was deciding whether federal or state law should apply to claims arising under Section 301 of

the LMRA, 29 U.S.C. § 185(a). This Court was in no way addressing the preclusion of a suit being brought in district court for a minor dispute which had been settled by an arbitrator.

Petitioner additionally relies on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). *Alexander* has no application to the case before this Court. The petitioner in *Alexander* had a discrimination claim against its employer. Remedies for this type claim were provided for under the collective bargaining agreement. These remedies, however, were not exclusive because Title VII of the Civil Rights Act of 1964 provides a separate and distinct remedy for such behavior on the part of the employer which may be brought directly to federal court. An arbitrator's decision in that instance would have no effect on the district court's jurisdiction of the Title VII claim.

In stark contrast, the case before this Court arises solely under the Collective Bargaining Agreement and the Union Shop Agreement. Petitioner's claim clearly relates to the procedures to be followed under the Union Shop Agreement, by himself, Southern Pacific and BRAC. All of these questions are clearly characterized as minor disputes which, by the terms of the RLA, must be submitted to the grievance and arbitration procedures and governed by the finality of the arbitrator's decision. The court of appeals properly affirmed the district court's alternative holding that Petitioner's attempt to obtain a de novo trial of the issues litigated before the arbitrator is a substantive ground for the granting of summary judgment.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID M. BROWN
(Counsel of Record)
ROSEMARY SMITH
SMITH, GAMBRELL & RUSSELL
2400 First Atlanta Tower
Atlanta, Georgia 30383
(404) 656-1800
Attorneys for Southern Pacific Transportation Company

JAMES M. DARBY
(Counsel of Record)
Associate General Counsel
Transportation Communications International Union
3 Research Place
Rockville, Maryland 20850
(301) 948-4910
Attorney for Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees

December 18, 1989